STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA HOOVER,

Plaintiff-Appellant,

v

TED NUGENT and SYNDICATED COMMUNICATIONS VENTURE PARTNERS II, LIMITED PARTNERSHIP, d/b/a WWBR RADIO STATION,

Defendants-Appellees.

UNPUBLISHED
December 26, 2000

No. 216764
Wayne Circuit Court
LC No. 98-807954-NO

Before: Bandstra, C.J., and Fitzgerald and D.B. Leiber*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition and dismissing plaintiff's defamation claim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

During the course of a WWBR talk show hosted by defendant Nugent, a caller stated that his granddaughter reported that plaintiff, her teacher, had told her, "Hunting is bad, it kills nature." Nugent, an avid hunter, criticized that statement as being "absolutely sick." He also referred to plaintiff as a "bitch," accused her of "lying" to the child, and characterized her as "clinging to ignorance." The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), ruling that the words were nonfactual opinions and not defamatory.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). "When addressing a defamation claim, a reviewing court is required to make an independent examination of the record to ensure against forbidden intrusions into the field of free expression." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000).

* Circuit judge, sitting on the Court of Appeals by assignment.

A defamatory statement is a false statement of fact that, "considering all the circumstances, … tends to so harm the reputation of an individual as to lower that individual's reputation in the community or deter third persons from associating or dealing with that individual." *Kevorkian v American Medical Ass'n,* 237 Mich App 1, 5; 602 NW2d 233 (1999). The elements of a defamation claim are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). *Ireland v Edwards,* 230 Mich App 607, 614; 584 NW2d 632 (1998). Defamation per se exists where the words spoken "are false and malicious and are injurious to a person in that person's profession or employment." *Glazer v Lamkin,* 201 Mich App 432, 438; 506 NW2d 570 (1993). "In a case involving a private plaintiff, a media defendant, and a publication regarding an area of public concern, the plaintiff bears the burden of proving falsity and of establishing that the defendant's publication of the communication at issue was negligent." *American Transmission, Inc v Channel 7 of Detroit, Inc,* 239 Mich App 695, 702; 609 NW2d 607 (2000). The "court may decide as a matter of law whether a statement is actually capable of defamatory meaning." *Ireland, supra* at 619.

The defendant's "statements must be viewed in context to determine whether they are capable of defamatory interpretation, or whether they constitute no more than 'rhetorical hyperbole' or 'vigorous epithet.' Thus, some expressions of opinion are protected." *Kevorkian, supra* at 7 (citations omitted). A statement phrased as an opinion may be provable as false and thus actionable. In *Ireland, supra* at 616, this Court explained the distinction between actionable and nonactionable statements expressed as opinions by pointing to the Supreme Court opinion of *Milkovich v Lorain Journal Co,* 497 US 1; 110 S Ct 2695; 111 L Ed 2d 1 (1990), in which the Court "suggested that the statement 'In my opinion Mayor Jones is a liar' would be potentially actionable, while the statement 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin' would not be actionable." The Court apparently intended to distinguish between an objectively verifiable event such as lying in the former case and a subjective assertion such as being ignorant in the latter. *Id*.; *Kevorkian, supra* at 6.

Defendant first said, "Sick, it's absolutely sick," referring either to what plaintiff said about hunting or that she said it to a child. Such a statement is not provable as either true or false. It is an opinion which one might embrace or condemn, depending upon one's view of hunting. Therefore, it is not defamatory. Likewise, the fact that defendant referred to plaintiff as a "bitch" is not defamatory. See, e.g., *Lee v Metro Airport Comm,* 428 NW2d 815, 821 (Minn App, 1988); *Ward v Zelikovsky,* 136 NJ 516, 537; 643 A2d 972 (1994); *Culverhouse v Cooke Ctr for Learning & Dev, Inc,* 177 Misc 2d 365, 369; 675 NYS2d 776 (1998).

Defendant also accused plaintiff of lying. He did not say that she was a liar in general or that he had personal knowledge that she had intentionally made a misrepresentation of fact in a particular instance. Rather, when read in context, defendant said that plaintiff was lying when she told Henry's granddaughter that hunting was wrong because "it kills nature." Obviously, he was stating a personal opinion "challenging plaintiff's position on a given controversial subject" *Faltas v State Newspaper,* 928 F Supp 637, 648 (D SC, 1996), aff'd 155 F3d 557 (CA 4, 1998), and employing "'a vigorous epithet used by those who considered [the appellant's] position

extremely unreasonable.'" *Underwager v Channel 9 Australia*, 69 F3d 361, 367 (CA 9, 1995), quoting *Milkovich, supra* at 17. Because defendant's statements viewed in context "cannot be seen by a reasonable fact finder as stating actual facts about plaintiff," they are not defamatory. *Faltas, supra* at 649.

Finally, defendant said that plaintiff was ignorant. When read in context, his statements about her ignorance were not referring to her knowledge of educational methods and principles or of her general qualifications as a teacher. Rather, he was remarking on her views toward hunting. Clearly defendant's opinion of plaintiff's opinion on a controversial subject cannot reasonably be understood as stating a fact about plaintiff that is objectively verifiable as true or false. In other words, the statement was "an appraisal of plaintiff's views … and not a direct assault on plaintiff as a teacher" and thus is not defamatory. *Haberstroh v Crain Publications, Inc*, 189 Ill App 3d 267, 272; 545 NE2d 295 (1989). Because none of the statements complained of was verifiably false, the trial court did not err in granting defendants' motion.

We decline to consider plaintiff's assertion that her claim was actually one for defamation by implication because plaintiff failed to plead such a cause of action and the trial court did not rule on it. *Reid v Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000); *Herald Co, Inc v Ann Arbor Pub Schs*, 224 Mich App 266, 278; 568 NW2d 411 (1997).

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis L. Leiber